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DRAFT REPORT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON ITS ELEVENTH SESSION

Held at the Palais des Nations, Geneva,
from 23 to 27 November 1992

Rapporteur: Mr. Donald Partridge (Canada)

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INTRODUCTION

1. The Intergovernmental Group of Experts on Restrictive Business Practices held its eleventh session at the Palais des Nations, Geneva, from 23 to .. November 1992.

2. In the course of the session, the Group held ... plenary meetings and ... informal meetings.

Opening statements

3. Upon his election as President, Mr. Gonzalo Santos (Philippines) commended the wide participation by experts from capitals. He noted that as the only universal forum for dealing with national and international competition policies, the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices attracted representatives from capitals in all regions. Over the last few years more and more developing countries in the process of industrialization had been elaborating their regulatory competition framework, taking into account the work done in UNCTAD. The high-level attendance at the present session reflected the market interest of formerly centrally planned and now privatizing economies in the current multilateral talks on experience in enforcing competition policy.

4. The Deputy to the Secretary-General of UNCTAD recalled that the Cartagena Commitment adopted at the eighth session of the Conference had emphasized the importance of strengthening national and international policies and multilateral cooperation to adapt to the profound political and economic changes that were taking place in the world. In order to strengthen UNCTAD's capabilities in addressing the economic and development problems of States members, the Conference had decided to reform the machinery and working methods of UNCTAD. In maintaining the Intergovernmental Group of Experts on Restrictive Business Practices as an integral part of the new institutional set-up, the international community at UNCTAD VIII had implicitly recognized the value of this body and its capacity to contribute to the overall efforts of UNCTAD in addressing the economic and development issues of the 1990s. In the area of competition, it had been established, in the Cartagena Commitment (para. 147), that "UNCTAD should pursue, through the Intergovernmental Group of Experts on Restrictive Business Practices, its work with regard to policies and rules for the control of restrictive business practices in order to encourage competition, to promote the proper functioning of markets and

efficient resource allocation, and to bring about further liberalization of international trade", and that efforts should be made by Governments or regional authorities to implement fully the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and to develop cooperation between national competition authorities, including competent authorities of regional groupings. The Conference had further agreed in the Cartagena Commitment (para. 148) that "The UNCTAD secretariat and developed countries should also provide, upon request and within available resources, developing countries and other countries with technical cooperation in the area of competition policy". Those decisions had given added significance to the results of the Second United Nations Conference to Review All Aspects of the Set, which had been held in 1990, and reflected the progressive convergence of views over the use of market signals and the fostering of entrepreneurial initiatives to improve efficiency and competitiveness, while recognizing that governmental actions might be necessary to complement the operation of markets or to correct market deficiencies.

5. The present session had important tasks on its agenda. First, it was called upon to review the operation of, and experience arising from, the Set of Principles and Rules, including in particular steps taken by States, at the national or regional levels, to meet their commitment to the Set. Secondly, the Group had before it two major studies on RBPs: (a) the revised version of the secretariat study on "Concentration of market power through mergers, take-overs, joint ventures and other acquisitions of control, and its effects on international markets, in particular, the markets of developing countries" (TD/B/RBP/80/Rev.1), which the secretariat had been requested to finalize, taking into account the comments made by member States on the first version, and (b) the annotated outline of a possible study on "Competition policy issues related to industrialization in developing countries", which was contained in Part I of document TD/B/RBP/90.

6. Thirdly, the Group of Experts might wish to devote attention to the important issue of exchange of information and consultations in the area of restrictive business practices. In order to encourage bilateral or multilateral consultations, a document containing a revised indicative checklist for requests for information, as well as an indication of possible

steps which countries might wish to take in the preparation of a case, and in their request for consultations, had been prepared by the secretariat for consideration by the Group (TD/B/RBP/78). The document included an updated Directory of Restrictive Business Practices Control Authorities, which was intended to encourage exchanges between competition authorities, and would be continuously brought up to date by the secretariat.

7. In that connection, he said that, in accordance with the practice followed at each session of the Group, multilateral consultations were scheduled to take place at the present session on two topics: (a) Deregulatory issues, including the appropriate regulation of natural monopolies; and (b) The rights of defendants in competition investigations and proceedings.

8. Fourthly, the Group had before it proposals for a new draft of the model law on RBPs, in the light of the comments of member States during and after the tenth session (TD/B/RBP/81/Rev.1), as well as a further compilation of the Handbook on Restrictive Business Practices Legislation (TD/B/RBP/87 and Add.1).

9. Fifthly, a progress report on UNCTAD's technical assistance activities in the field of competition policy was also before the Group in Part II of document TD/B/RBP/90.

10. Last but not least, the Group was expected to give guidance to the UNCTAD secretariat concerning the work programme on restrictive business practices. Emphasis was placed on the implementation of the Set, in particular in encouraging all countries to adopt competition legislation. For that purpose, a practical modern model law should be finalized as soon as possible; the technical assistance, advisory and training services of UNCTAD should be strengthened; and cooperation with other organizations, such as OECD, increased. He expressed appreciation for the excellent support UNCTAD had been receiving from many OECD countries in the area of technical cooperation; such support was essential in view of the immense task that lay ahead. He added that the increasing convergence of views on the need to adopt national competition policies should lead to the harmonization of such views with respect to the place of competition rules in the evolving multilateral trading system. This goal was necessary to give full expression to the recommendation of the Cartagena Commitment he had cited, in particular the need "to encourage competition, to promote the proper functioning of markets and efficient

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resource allocation, and to bring about further liberalization of international trade". That recommendation had also called for UNCTAD's work on RBPs to cover both goods and services. With respect to services, the newly created Standing Committee on Developing Services Sectors: Fostering Competitive Services Sectors in Developing Countries, was requested in its terms of reference to take into account the work undertaken by the Intergovernmental Group of Experts on Restrictive Business Practices. Similarly, the newly created Ad Hoc Group on Comparative Experiences with Privatization, which would be meeting the following week, was requested in its terms of reference to coordinate with the work of other bodies of UNCTAD.

Chapter I

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 3)

ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET:

(a) STUDIES ON RESTRICTIVE BUSINESS PRACTICES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES;

(b) INFORMATION AND CONSULTATIONS ON RESTRICTIVE BUSINESS PRACTICES;

(c) THE MODEL LAW OR LAWS FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES AND THE HANDBOOK ON RESTRICTIVE BUSINESS PRACTICES LEGISLATION;

(d) TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 4)

WORK PROGRAMME ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 5)

11. The representative of China recalled that, although efforts had been made by the international community, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which had been adopted more than a decade ago in 1980, was not being adequately implemented. He emphasized that States, in particular developing countries, had an obligation to implement the Set. Since his country had decided to set up a Socialist market economy, there was a need for legislation to control restrictive business practices. Hence, a law was being drafted establishing general principles and containing substantive chapters covering, inter alia, control of abuses of dominant positions of market power.

12. The draft law would be submitted to the National People's Congress for consideration in 1993. Source materials used in the drafting process included UNCTAD documents such as the Handbook on Restrictive Business Practices Legislation, the Model Law on Restrictive Business Practices. Assistance had been sought from UNCTAD and from various countries and in that connection he thanked the UNCTAD secretariat for organizing a seminar in China in 1992 in

which experts from the United Kingdom, Norway and France had participated. Such assistance would go a long way towards making significant progress in the implementation of the Set of Principles and Rules in future and technical assistance of that kind would continue to be necessary.

13. The representative of Argentina, noting that the Intergovernmental Group of Experts was aware of his country's basic monopolies and competition law, said he would limit his statement to recent developments related to competition in the area of consumer protection and privatization. With respect to consumer protection, the Senate had recently approved a draft law for the defence of consumers, the text of which had been transmitted to the UNCTAD secretariat. On privatization, he gave details of recent accomplishments in his country with respect to telecommunications, the supply of electric energy and railways, three sectors where Argentina had successfully introduced competition in the process of privatization.

14. On UNCTAD's activities in the area of RBPs, he made the following proposals:

(i) That the practical use of the Model Law could be improved by increased focusing of the information it contained on recent trends and developments at the international level;

(ii) Noting that, in his delegation's view, the study on concentration of market power was satisfactory in its present form, he proposed that a new study should be prepared by the secretariat on the issues of deregulation, privatization and competition.

15. Such a study should be undertaken in cooperation with the Ad Hoc Working Group on Comparative Experiences with Privatization. With respect to technical assistance, he thanked UNCTAD and the German Government for organizing an RBP seminar in Argentina on 16-18 November 1992.

16. The representative of India referred to document TD/B/RBP/90, which drew attention to the strong trend in developing countries towards liberalization, deregulation and market orientation. It highlighted the main potential advantages of liberalization, i.e. the speedier and greater satisfaction of consumer needs, the stimulation of entrepreneurial activity, more efficiency in investment and at the enterprise level, and greater allocative efficiency by the market, which would be realized only if enterprises were spurred on by the need to compete, and received accurate information on the state of demand.

17. Many countries had either enacted a competition law for the first time or improved their legislation in that respect. In India, in 1991, comprehensive amendments had been made to the Indian competition law, the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969. The changes were designed to give more power to the MRTP Commission. She added that India had greatly liberalized its import policy and foreign investment policy. Noting that countries were more prepared to promote liberalization when international markets were competitive, she wished to make the following suggestions for consideration by the Intergovernmental Group:

(i) There should be a harmonization of trade liberalization and competition policy;

(ii) Greater emphasis should be placed on promotion of, and encouragement for, competitive behaviour;

(iii) The Set of Principles and Rules should be made more comprehensive and should provide for relief in international transactions;

(iv) The Set should have some legal force.

18. The representative of Romania considered that the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was only possible in a market economy. Prior to December 1989, his country's economy had developed within the framework of a centrally planned system; after that date, it had embarked on a wide process with, as its basic economic objective, the transition to a market economy. In implementing that reform programme, a significant number of legislative measures had been adopted and enforced during 1990-1992, focused mainly on:

- Transformation and restructuring of State enterprises into autonomous commercial companies operating on market economy principles;
- The creation of suitable conditions for development and strengthening of the private sector;
- The encouragement of foreign investments by bringing in a liberal legislative framework which allowed the granting of important facilities and guarantees for foreign investors;
- Gradual price liberalization and the establishment of prices on a realistic basis, taking into account international costs and the elimination, to a large extent, of financial subsidies, along with the assurance of measures for social protection;

- The liberalization of foreign trade;
- The adjustment of the financial and banking system to meet market economy demands.

19. Although his country did not yet have a specific law on restrictive business practices, some laws adopted to introduce the economic and financial reform had been inspired by the main principles and rules contained in section D, articles 3 and 4, of the Set of Principles and Rules. For example: Law No. 15/1990 on the reorganization of State enterprises as "régies autonomes" and commercial companies which, under Chapter V ("Association and free competition"), prohibited practices restricting competition such as agreements, decisions and concerted practices, and abuses of dominant position. Other provisions against unfair competition behaviour were included in Law No. 11/1991. His country had also made progress in drafting a specific law on protection of competition, which had been formulated with the assistance of OECD experts and experts from competition authorities in such countries as the United States, France, Belgium and Germany.

20. He thanked the Competition Authorities of the United States (Federal Trade Commission and United States Department of Justice in June 1992), France (Council of Competition and Ministry of Economy and Finance in May 1992) and the OECD in September 1991, for the seminars organized in Romania.

21. In conclusion, he stated that it was not enough to have a law, even a good one, without proper enforcement and application of its provisions. To that end, his country was keenly interested in receiving specialized assistance to have its staff trained on concrete matters related to implementation of the law, i.e., ways and means for detecting RBPs and the conduct of investigations and inquiries.